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No. 96-1398

In The

Supreme Court of the United States

October Term, 1996

BARKLEY SEED, INC. d/b/a PACIFIC SOUTHWEST SEED & GRAIN, INC.,

Petitioner,

vs.

BOTELHO SHIPPING CORP., ASEAN CHARTERING CO., LTD., FAIRMONT SHIPPING (H.K.) LTD., and SINGCO MARITIME S.A.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Should this Court re-examine its longstanding rule in *Robins Dry Dock* barring recovery of purely economic losses in unintentional maritime tort claims where:

(1) There is no conflict among the circuits in applying *Robins Dry Dock,* petitioner's arguments to the contrary notwithstanding;

(2) Petitioner's claim is barred by even the most stringent reading of *Robins Dry Dock*; and

(3) The trial court expressly found that petitioner was estopped from recovering on its negligence claim in any event by virtue of its premature negotiation of misdated bills of lading.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE 1

ARGUMENT 5

A. THERE IS NO CONFLICT AMONG THE CIRCUITS IN APPLYING *ROBINS DRY DOCK* TO PRECLUDE RECOVERY IN TORT ABSENT PHYSICAL DAMAGE 5

1. The Second Circuit has Repeatedly Applied *Robins Dry Dock* 6

2. The Fourth Circuit Has Continually Applied *Robins Dry Dock* 7

3. The Sixth Circuit Has Never Even Considered *Robins Dry Dock* 9

4. Barkley's Reliance Upon Various Dissenting Opinions Does Not Demonstrate The Existence of a Conflict 11

B. THIS COURT'S DECISIONS IN *EAST RIVER* AND *THE SUCARSECO* DISPEL ANY NOTION THAT IT HAS RETREATED FROM ITS POSITION IN *ROBINS DRY DOCK* 12

C. BARKLEY'S CLAIM IS BARRED BY EVEN THE MOST STRINGENT READING OF *ROBINS DRY DOCK* 16

D. BARKLEY'S MISCONDUCT IN PREMATURELY NEGOTIATING THE MISDATED BILLS OF LADING ESTOPS IT FROM RECOVERING AGAINST VESSEL INTERESTS AND OBVIATES THIS COURT'S NEED TO EXAMINE *ROBINS DRY DOCK* 19

CONCLUSION 21

TABLE OF AUTHORITIES

Page

Federal Cases

Aktieselskabet Cuzco v. The Sucarseco, 294 U.S. 394, 55 S. Ct. 467, 79 L. Ed. 942 (1935) 15, 16

American Dredging Co. v. Plaza Petroleum, Inc., 845 F. Supp. 91 (E.D.N.Y. 1993) 7

In re Bethlehem Steel Corp., 631 F.2d 441 (6th Cir. 1980), *cert. denied*, 450 U.S. 421, 101 S. Ct. 1370, 67 L. Ed. 2d 349 (1981) 9, 10

Cahokia Marine Service v. American Barge & Towing, 635 F. Supp. 830 (E.D. Mo. 1986) 12

Cargill, Inc. v. Doxford & Sunderland, Ltd., 782 F.2d 496, *rehearing denied*, 785 F.2d 1296 (5th Cir. 1986) 18, 19

Cleveland Tankers, Inc. Limitation Proceedings, 791 F. Supp. 669 (E.D. Mich. 1992) 8, 10

Complaint of Great Lakes Towing Co., 395 F. Supp. 810 (N.D. Ohio 1974) 10

East River Steamship Corp. v. Transamerica Delaval Inc., 476 U.S. 858, 106 S. Ct. 2295, 90 L. Ed. 2d 865 (1986) 12, 13, 14

Federal Commerce & Navigation Co. v. M/V MARATHONIAN, 528 F.2d 907 (2d Cir. 1975), *cert. denied*, 425 U.S. 975, 96 S. Ct. 2176, 48 L. Ed. 2d 799 (1976) 6, 7, 16

General Foods Corporation v. United States, 448 F. Supp. 111 (D. Md. 1978) 8

Getty Rfg. & Mktg. Co. v. M/T FADI B, 766 F.2d 829 (3d Cir. 1985) 11, 17

TABLE OF AUTHORITIES – Continued

Page

Henderson v. Arundel Corporation, 384 F.2d 998 (4th Cir. 1967), *affirming*, 262 F. Supp. 152 (D. Md. 1966) 7

Holt Hauling & Warehousing Systems, Inc. v. M/V MING JOY, 614 F. Supp. 890 (E.D. Pa. 1985) 19

In Re Kinsman Transit Co., 388 F.2d 821 (2d Cir. 1968) 6, 10, 11

Louis Dreyfus Corp. v. 27,946 Long Tons of Corn, 830 F.2d 1321 (5th Cir. 1987) 17

Marine Navigation Sulphur Carriers, Inc. v. Lone Star Industries, Inc., 638 F.2d 700 (4th Cir. 1981) 8

Mathiesen v. M/V OBELIX, 817 F.2d 345 (5th Cir.), *cert. denied*, 484 U.S. 898, 108 S. Ct. 234, 98 L. Ed. 2d 192 (1987) 16

Matter of Williamson Leasing Co., Inc., 577 F. Supp. 890 (E.D. Mo. 1984) 12

Oki America, Inc. v. Microtech Intl., Inc., 872 F.2d 312 (9th Cir. 1989) 19

Plaza Marine, Inc. v. Exxon Corporation, 814 F. Supp. 334 (S.D.N.Y. 1993) 6

Rederi A/B Soya v. Evergreen Marine Corporation, 1972 A.M.C. 538 (4th Cir. 1972), *affirming*, 1972 A.M.C. 1555 (E.D. Va. 1971) 7

United States v. Aadal, 280 F. Supp. 862 (S.D.N.Y. 1967), *affirmed*, 407 F.2d 381 (2d Cir.), *cert. denied*, 395 U.S. 967, 89 S. Ct. 2114, 23 L. Ed. 2d 754 (1969) 4

Venore Transportation Co. v. M/V STRUMA, 583 F.2d 708 (4th Cir. 1978) 7, 8

TABLE OF AUTHORITIES – Continued

Page

FEDERAL STATUTES

49 U.S.C.A. § 121 4

49 U.S.C.A. § 80116 4

STATEMENT OF THE CASE

This brief is filed on behalf of BOTELHO SHIPPING CORP., SINGCO MARITIME S.A., ASEAN CHARTERING CO., LTD., and FAIRMONT SHIPPING (H.K.) LTD. (collectively "Vessel Interests"), defendants and appellees below. Petitioner BARKLEY SEED, INC. d/b/a PACIFIC SOUTHWEST SEED & GRAIN, INC. is referred to as "BARKLEY." Defendant CORMORANT BULK CARRIERS is referred to as "Cormorant." The National Seed & Agriculture Service Company is referred to as "National Seed."

In late May or early June 1988, Barkley contracted to sell 20,001 metric tons of wheat seed to a Saudi Arabian cooperative, National Seed, providing National Seed with an option to purchase an additional 5,000 metric tons (RT, Feb. 9, 98:18-25). National Seed exercised that option (RT, Feb. 9, 103:13-18).

Under the terms of the letters of credit opened by National Seed for purchase of the wheat seed, Barkley was obligated to present "on board" bills of lading indicating that 10,000.5 metric tons of the cargo had been shipped from Los Angeles, California, by August 25, 1988, another 10,000.5 metric tons shipped by September 25, 1988, and the balance of 5,001 metric tons shipped by September 30, 1988, (RT, Feb. 9, 102:23-103:5; RT, Feb. 13, 13:9-10). Barkley contemplated a voyage length of approximately 40 days (RT, Feb. 13, 7:10-12).

In the summer of 1988, Barkley contracted with Cormorant for transportation of the wheat seed to Saudi Arabia (ER, 7 ¶ 13; RT, Feb. 9, 100:19-21). Originally,

Cormorant intended to use the M/V PHILIPPINE VICTORY to transport the second half of Barkley's shipment, departing from Los Angeles in September 1988 (RT, Feb. 9, 100:19-24).

On August 29, 1988, Cormorant contacted Vessel Interests with a proposal to charter the M/V SINGAPORE VICTORY, which at the time was in a shipyard in Japan undergoing repair (RT, Feb. 8, 112:6-11; Exhibit 5006; RT, Feb. 10, 199:17-20; Exhibit 5011). The parties reached an agreement on September 2, 1988. (RT, Feb. 8, 146:19-147:17; Exhibit 3). The charter party required Vessel Interests to deliver the vessel to Cormorant anytime between September 25, 1988, and October 5, 1988, at a point between Vancouver and the Columbia River, or at an equidistant point from Japan off the United States West Coast, at Cormorant's option (RT, Feb. 8, 132:11-133:25). Delivery after October 5 allowed Cormorant to cancel the charter party (ER, 8 ¶ 19; RT, Feb. 10, 201:18-204:15).

As of September 2, 1988, Vessel Interests did not know to what load port Cormorant intended to send the M/V SINGAPORE VICTORY, what cargo Cormorant intended to carry, whose cargo Cormorant had contracted to carry, to what discharge port Cormorant intended to direct the vessel or whether the cargo had any delivery deadline (RT, Feb. 8, 165:2-166:10; RT, Feb. 10, 185:24-186:20). Cormorant advised Barkley that it intended to use the M/V SINGAPORE VICTORY to transport Barkley's second shipment of wheat seed, consisting of 15,001.5 metric tons, to Saudi Arabia (RT, Feb. 9, 100:23-101:4).

On September 12, 1988, Cormorant first advised Vessel Interests that the M/V SINGAPORE VICTORY was to proceed to Los Angeles to load a cargo of bagged wheat seed bound for Saudi Arabia (RT, Feb. 8, 163:12-164:19; Exhibit 5022). During the voyage from Japan to Los Angeles, the M/V SINGAPORE VICTORY encountered mechanical problems. Vessel Interests advised Cormorant that the vessel would not arrive at the delivery point, approximately two days west of Los Angeles, by the October 5 charter party cancellation date (RT, Feb. 8, 220:11-221:13; Exhibit 5038). Vessel Interests requested that Cormorant extend the cancellation date to October 12. Cormorant agreed to do so (RT, Feb. 8, 223:10-16; RT, Feb. 8, 226:22-227:7; Exhibit 5048).

The vessel was thereafter timely delivered to Cormorant on October 12 and arrived in Los Angeles on October 14 (ER, 8 ¶ 22). All of Barkley's cargo was loaded aboard the vessel by October 20, 1988 (ER, 9 ¶ 20). The M/V SINGAPORE VICTORY departed Los Angeles on October 22, 1988 and arrived in Dammam, Saudi Arabia on December 7, 1988 (ER, 9 ¶¶ 25 and 28). The vessel averaged approximately 11 knots on the 47-day voyage to Saudi Arabia (Exhibit C, Appendix A, pp. 8-9). Cargo discharging operations concluded on December 12, 1988, with all of the cargo delivered undamaged (ER, 9 ¶ 29).

Because Barkley had failed to comply with the September 25 and September 30 letter of credit loading deadlines, Barkley was in breach of its contracts with National Seed. Notwithstanding the fact that the vessel was not yet in Los Angeles, much less loaded, Cormorant's agent issued bills of lading to Barkley that reflected that the cargo was loaded on board as of the letter of credit

deadlines (ER, 8 ¶¶ 20 and 21). Barkley received the misdated bills of lading on October 6, 1988 and immediately submitted them to the bank for payment under the letters of credit, even though Barkley knew that the cargo was not on board the M/V SINGAPORE VICTORY (RT, Feb. 9, 147:7-24; RT, Feb. 9, 137:7-139:10; RT, Feb. 9, 153:9-22).[1] Barkley concedes that it did not ask National Seed for an extension of the letters of credit loading deadlines to allow later loading after Cormorant agreed to extend the charter party canceling date, because National Seed likely would have demanded certain "consideration" from Barkley in exchange for the extensions (RT, Feb. 13, 70:21-71:16).

Barkley never told National Seed (1) that the M/V SINGAPORE VICTORY was delayed in departing Sasebo, Japan; (2) that the vessel encountered mechanical difficulties en route to Los Angeles; (3) that the cargo was not loaded aboard the vessel until October 20; (4) that the vessel would not arrive in Dammam by the November 15 deadline; and (5) that Barkley Seed had negotiated the antedated bills of lading knowing that the cargo was not aboard the M/V SINGAPORE VICTORY on the dates reflected on the bills of lading (RT, Feb. 13, 18:21-19:6; 21:14-22:1; 25:2-6; 35:20-22; 39:20-40:16; 51:7-10).

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[1] Knowingly negotiating a misdated bill of lading is a misdemeanor punishable by five years imprisonment and/or a fine of up to $5,000. 49 U.S.C.A. § 121, repealed and superseded by 49 U.S.C.a. § 80116. *United States v. Aadal*, 280 F. Supp. 862 (S.D.N.Y. 1967) *affirmed* 407 F.2d 381 (2d Cir.) *cert. denied*, 395 U.S. 967, 89 S. Ct. 2114, 23 L. Ed. 2d 754 (1969).

The planting season in Saudi Arabia in 1988 extended until mid-February 1989 (ER, 7 ¶ 12). In the northern regions, planting is intentionally delayed until after mid-December to avoid frost damage (RT, Feb. 16, 36:16-20). After discharge from the vessel, the wheat seed could be distributed to farmers within five to eight day (RT, Feb. 10, 25:2-11). Accordingly, the wheat seed delivered aboard the M/V SINGAPORE VICTORY arrived in time for planting in the 1988-89 season.

National Seed began purchasing 10,000 metric tons of wheat in Saudi Arabia on November 19, 1988, ostensibly to deliver as seed to farmers (ER, 38 ¶ 20). But National Seed had to convert the wheat into seed. That process involved germination testing, cleaning the seed, treating it with a fungicide, bagging the seed and distributing it to farmers (RT, Feb. 10, 31:9-35:11). There were only two cleaning machines in Saudi Arabia, with a capacity of 500 tons per day (RT, Feb. 10, 35:3-11).

ARGUMENT

A. THERE IS NO CONFLICT AMONG THE CIRCUITS IN APPLYING ROBINS DRY DOCK TO PRECLUDE RECOVERY IN TORT ABSENT PHYSICAL DAMAGE.

As Barkley concedes, the First, Third, Fifth, Ninth and Eleventh Circuits have all expressly adopted the bright line rule precluding recovery of economic loss absent physical damage to a proprietary interest in an

admiralty unintentional tort action.[2] Contrary to Barkley's assertion, however, the Second and Fourth Circuits have also expressly followed the *Robins Dry Dock* doctrine, and the Sixth Circuit has never addressed the issue.

1. The Second Circuit has Repeatedly Applied *Robins Dry Dock.*

The Second Circuit has expressly followed *Robins Dry Dock. Federal Commerce & Navigation Co. v. M/V MARATHONIAN,* 528 F.2d 907, 908 (2d Cir. 1975), *cert. denied,* 425 U.S. 975, 96 S. Ct. 2176, 48 L.Ed. 2d 799 (1976). In that case, decided seven years after *Kinsman II,*[3] a case relied upon principally by petitioner to support its assertion of a purported conflict (Petition, p. 8), the Second Circuit affirmed the district court's dismissal of a time charterer's claim for economic losses sustained while the chartered vessel was out of service for repair of collision damages caused by defendant's negligence. The Second Circuit also expressly noted that the Supreme Court had not retreated from the bright line rule announced in *Robins Dry Dock. Federal Commerce,* 528 F.2d at 908.

District courts within the Second Circuit have also applied the *Robins Dry Dock* rule in admiralty tort cases without any mention of the *Kinsman* analysis. *Plaza Marine, Inc. v. Exxon Corporation,* 814 F. Supp. 334, 335 (S.D.N.Y. 1993) (applying *Robins Dry Dock* physical damage requirement in action for economic losses arising

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[2] Petition for Writ of Certiorari (the "Petition"), p. 8, fn.16 and accompanying text.

[3] *In Re Kinsman Transit Co.,* 388 F.2d 821 (2d Cir. 1968).

from closure of waterway to navigation caused by defendant's negligent discharge of oil); *American Dredging Co. v. Plaza Petroleum, Inc.*, 845 F. Supp. 91, 93 (E.D.N.Y. 1993) (denying recovery of pecuniary damages to buyer of contaminated fuel, citing a trend in tort law against recovery of purely economic losses in negligence actions).

Accordingly, Barkley has cited no case from either the Second Circuit or district courts within the Second Circuit which rejects *Robins Dry Dock* and follows *Kinsman* in an admiralty unintentional tort claim. Moreover, contrary to Barkley's contention, if Barkley had sued Vessel Interests in the Second Circuit, the district court would have been required to follow *Federal Commerce* not *Kinsman*, as Barkley's interests are identical to the charterers in *Robins Dry Dock* and *Federal Commerce* (*i.e.*, Barkley allegedly sustained economic loss without damage to a property interest because of delays associated with repairs to a vessel Barkley had contracted to use.)

2. The Fourth Circuit Has Continually applied *Robins Dry Dock*.

In *Venore Transportation Co. v. M/V STRUMA*, 583 F.2d 708 (4th Cir. 1978), the Fourth Circuit specifically endorsed the validity of the *Robins Dry Dock* doctrine, even though distinguishing its application to the facts before it. The *Venore* court also cited various prior Fourth Circuit (and other circuit) decisions following the *Robins Dry Dock* rule: *Rederi A/B Soya v. Evergreen Marine Corporation*, 1972 A.M.C. 538 (4th Cir. 1972), *affirming* 1972 A.M.C. 1555 (E.D. Va. 1971) (*Robins Dry Dock* binding on lower courts); *Henderson v. Arundel Corporation*, 384 F.2d

998 (4th Cir. 1967), *affirming* 262 F. Supp. 152, 158-160 (D. Md. 1966) (*Robins Dry Dock* precluded claim by seamen for lost wages and subsistence from vessel which struck dredge, disabling it for six weeks); *General Foods Corporation v. United States*, 448 F. Supp. 111 (D. Md. 1978). *Venore Transportation*, 583 F.2d at 710.

The *Venore* court was especially careful to note that its holding, which was consistent with *Robins Dry Dock*, *id.* at 711, was limited to allowing a charterer to recover charter hire paid during the time a vessel was out of service for collision repairs. Reasoning that the vessel owner would be entitled to recover that loss if payment of charter hire had been suspended, it was only logical to allow recovery of those collision-related losses when payment was not suspended. *Id.* Other economic losses, such as lost profits, were not recoverable. *Id.*

In *Marine Navigation Sulphur Carriers, Inc. v. Lone Star Industries, Inc.*, 638 F.2d 700 (4th Cir. 1981), the Fourth Circuit did not even mention *Robins Dry Dock*, apparently because the parties did not raise that issue.[4] Moreover, that court affirmed dismissal of various claims by businesses for economic losses unaccompanied by physical injury arising from a vessel-bridge collision on the ground that the claims were too remote. *Marine Navigation* has since been recognized as supporting the bright line rule precluding recovery of economic losses without damage to property. *Cleveland Tankers, Inc. Limitation Proceedings*, 791 F. Supp. 669, 673 n.3 (E.D. Mich. 1992).

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[4] Barkley cites *Marine Navigation* as evidence that "the Fourth Circuit rejected the applicability of *Robins*. . . ." (Petition, p. 17.)

In short, Barkley also fails to cite a single case from either the Fourth Circuit or district courts within the Fourth Circuit which rejects *Robins Dry Dock* in an admiralty unintentional tort claim. Accordingly, its argument that the Second and/or Fourth Circuits are in conflict with the remaining circuits in this application of *Robins Dry Dock* draws no support from existing case law.

3. The Sixth Circuit Has Never Even Considered *Robins Dry Dock*.

Barkley is similarly mistaken when it contends that the Sixth Circuit's decision in *In re Bethlehem Steel Corp.*, 631 F.2d 441 (6th Cir. 1980), *cert. denied*, 450 U.S. 421, 101 S. Ct. 1370, 67 L. Ed. 2d 349 (1981), "expressly adopted the Kinsman Transit approach" (Petition, p. 17). In that case, a ship struck a bridge in Canadian waters, resulting in closure of a canal for approximately two weeks. The closure caused economic losses unaccompanied by physical damage to owners and charterers of vessels detained by the accident. The offending shipowner filed a limitation of liability action in Canadian courts, but several claims were filed in U.S. District Court for the Northern District of Ohio, prompting the ship owner to file a second limitation action in Ohio.

The Canadian court dismissed the claims asserted by vessel owners and charterers which sought recovery of purely economic losses on the ground that even foreseeable, proximately caused economic harm unaccompanied by physical injury is generally not compensable under Canadian law. (631 F.2d at 443-444.) The district court in

the United States, applying Canadian law, similarly dismissed the claims asserted by ship owners who sought vessel detention damages. (631 F.2d at 446.)

On appeal, the claimants argued that (1) the Canadian trial court and the district court misstated the applicable Canadian law regarding compensability of negligently caused economic losses unaccompanied by physical damage to person or property, and (2) an "overriding domestic policy translated into law" mandates recovery of such damages in U.S. courts. *Bethlehem Steel*, 631 F.2d at 446. After summarily rejecting the claimants' first argument, the Sixth Circuit held that the claimants had not sustained their burden of proving "the existence of an overriding policy of the United States which is different from that of Canada on the question of permitting recovery for economic loss in the absence of physical injury." *Bethlehem Steel*, 631 F.2d at 448.

The *Bethlehem Steel* court addressed *Petition of Kinsman Transit Co.*, 388 F.2d 821 (2d Cir. 1968) only because the claimants argued that it represented the United States' "overriding domestic policy" on the issue of economic loss. The court did not address or consider *Robins Dry Dock*. By affirming the district court's dismissal of the claims under Canadian law, the Sixth Circuit neither adopted *Kinsman* nor rejected the *Robins Dry Dock* doctrine. *Cleveland Tankers, Inc. Limitation Proceeding*, 791 F. Supp. 669, 675-76 (E.D. Mich. 1992) (district court within Sixth Circuit explaining *Bethlehem Steel* court's ruling, and expressly rejecting *Kinsman Transit* analysis and following *Robins Dry Dock*); *Complaint of Great Lakes Towing Co.*, 395 F. Supp. 810, 811 (N.D. Ohio 1974) (recognizing and applying "well-established" admiralty rule that precludes

recovery in tort absent physical damage to a property interest).

Therefore, as with the Second and Fourth Circuits, Barkley has cited no case from either the Sixth Circuit or district courts within the Sixth Circuit which rejects *Robins Dry Dock* in an admiralty unintentional tort claim. Barkley has failed to provide this Court with any evidence, whatsoever, of actual conflict among the circuits in the application of *Robins Dry Dock*.

4. Barkley's Reliance Upon Various Dissenting Opinions Does Not Demonstrate The Existence of a Conflict.

Perhaps the most telling indication of the absence of any split among the circuits is the fact that Barkley relies so heavily upon the *dissenting* opinions in *Getty* and *Testbank*.[5] Moreover, Barkley does not analyze the Fourth and Sixth Circuit cases that it contends give rise to a split among the circuits, perhaps because as discussed above, those cases do not support Barkley's contention of a split. Indeed, as set forth above, other authorities from the Second, Fourth and Sixth Circuits confirm that the *Robins Dry Dock* doctrine remains the law within those circuits. Even *Kinsman II* cites *Robins Dry Dock* with approval and explains in an accompanying footnote that, in a typical delay case, foreseeable economic losses would not be recoverable absent physical injuries. *Kinsman II*, 388 F.2d at 825 n. 8.

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[5] Petition, p. 8 fn. 17, p. 13 fn. 45, p. 14 fns. 55-58, and p. 30.

In the face of an overwhelming body of authorities applying *Robins Dry Dock,* Barkley has not cited a single federal maritime case in which a claimant (other than a commercial fisherman) recovered economic losses without accompanying physical damages to a property interest in an admiralty unintentional tort action. Every circuit that has considered *Robins Dry Dock* has applied it.[6] There simply is no split among the circuits.

B. THIS COURT'S DECISIONS IN *EAST RIVER* AND *THE SUCARSECO* DISPEL ANY NOTION THAT IT HAS RETREATED FROM ITS POSITION IN *ROBINS DRY DOCK.*

No discussion of the issue of recovery in tort of economic losses unaccompanied by physical damage is complete without consideration of this Court's decision in *East River Steamship Corp. v. Transamerica Delaval Inc.,* 476 U.S. 858, 106 S. Ct. 2295, 90 L. Ed. 2d 865 (1986).[7] In

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[6] Two district courts in the Eighth Circuit have also followed *Robins Dry Dock: Matter of Williamson Leasing Co., Inc.,* 577 F. Supp. 890, 891-92 (E.D. Mo. 1984) (denying recovery of lost wages and employment benefits to railroad workers who sustained loss of employment caused by vessel's collision with railroad bridge that resulted in temporary shutdown of bridge); *Cahokia Marine Service v. American Barge & Towing,* 635 F. Supp. 830, 833 (E.D. Mo. 1986).

[7] This Court in *East River* stated in a footnote that it was not reaching the broader issue of "whether a tort cause of action can ever been stated in admiralty when the only damages sought are economic." 476 U.S. at 87, 106 S. Ct. 2295, 90 L. Ed. 2d at 877, fn. 6. The commonality of principles, however, is irrefutable. Moreover, the Court in *East River* cited *Robins Dry Dock* with approval. 476 U.S. at 874, 106 S. Ct. 2295, 90 L. Ed. 2d at 879.

East River, this Court held that a plaintiff could not maintain a products liability claim in admiralty where the only harm asserted is economic loss caused by the product injuring itself. In that case, companies that had bareboat chartered four tank vessels filed an action against the manufacturer of the main propulsion engine's turbine that was damaged when the turbine malfunctioned due to design and installation defects. Plaintiffs asserted tort theories of negligence and strict liability for repair costs and economic losses. In denying plaintiffs any recovery, this Court cited *Robins Dry Dock* and explained that a product damaging itself is most properly the subject of a warranty claim:

> A warranty action also has a built-in limitation on liability, whereas a tort action could subject the manufacturer to damages of an infinite amount. The limitation in a contract action comes from the agreement of the parties and the requirement that consequential damages, such as lost profits, be a foreseeable result of the breach. (Citations omitted.) In a warranty action where the loss is purely economic, the limitation derives from the requirements of foreseeability and of privity, which is still generally enforced for such claims in a commercial setting. (Citation omitted.)
>
> In products liability law, where there is a duty to the public generally, foreseeability is an inadequate brake. (Citations omitted.) Permitting recovery for all foreseeable claims for purely economic loss could make a manufacturer liable for vast sums.

476 U.S. at 871-75, 106 S. Ct. 2295, 90 L. Ed. 2d 865, 877-79.[8]

The dichotomy recognized by this Court is clear: Recovery of economic loss is exclusively within the province of contract and warranty law, while tort law is available solely to compensate for physical injuries to persons or "other property" in admiralty actions. While *East River* is a products liability case involving a defective product that damaged itself resulting in economic losses, it serves to illustrate a critical point: Where a product has not met a customer's expectations, or where the customer is disappointed in a product's performance, a breach of contract warranty action adequately safeguards against foreseeable economic losses.

Here, Barkley contracted to use a vessel. Barkley was disappointed with the vessel's performance, but Barkley's cargo was delivered undamaged to its proper destination. Therefore, Barkley's only claim is for alleged economic losses resulting from a brief delay in delivery. Under those circumstances, Barkley is limited to recovering *in contract* since Barkley's contention is that it did not receive the benefit of its bargain from the party with whom it contracted to transport its goods (*i.e.*, Cormorant).[9] Moreover, if Vessel Interests' negligence had

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[8] This Court explained that contract warranty law adequately protects against economic loss so that permitting recovery for purely economic losses under negligence or strict liability could cause contract law to "drown in a sea of tort." *East River*, 476 U.S. at 866.

[9] Barkley's president, Stephen Leffler, testified that so long as the vessel arrived in Saudi Arabia in a timely fashion, the

proximately caused physical damage to Barkley's cargo (*e.g.*, if the hatch covers leaked allowing incursion of salt water into the cargo holds, or if the cargo holds were contaminated with vermin and damaged the cargo), Barkley could recover proximately resulting losses.

Barkley's reliance upon this Court's 1935 opinion in *Aktieselskabet Cuzco v. The Sucarseco*, 294 U.S. 394, 55 S. Ct. 467, 79 L. Ed. 942 (1935), is also misplaced. *The Sucarseco* involved claims arising out of the archaic maritime doctrine of "general average" pursuant to which cargo owners must contribute as participants in a common adventure with the carrying vessel to avoid a "common imminent peril" by making a "voluntary sacrifice" or incurring "extraordinary expenses." *Id.* at 401. This Court there stated:

> The claim of the cargo owners for their general average contributions is not in any sense a derivative claim. It accrues to the cargo owners in their own right. It accrues because of cargo's own participation in the common adventure and the action taken on behalf of cargo and by its representative to avert a peril with which that adventure was threatened. Being cargo's own share of the expense incurred in the common

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speed made by the vessel during the voyage was of no concern to him. (RT, Feb. 13, 72:12-20.) That testimony illustrates why Barkley's claim can only be asserted as a contract claim. If the M/V SINGAPORE VICTORY had departed Los Angeles September 29 and performed exactly as it did on the subject voyage, it would have arrived in Saudi Arabia on November 15 and there would be no claim. The fact that the vessel departed Los Angeles October 22 does not transform Barkley's breach of contract claim into a tort.

> interest, the amount which is paid properly belongs in the category of damage which the cargo owners have suffered by reason of the collision.

Id. at 404.

In expressly distinguishing *Robins Dry Dock*, this Court in *The Sucarseco* stated that "cargo as well as ship was placed in jeopardy." *Id.* Cargo interests there paid a proportionate share of the physical damage caused by the collision. Those damages were not in any sense consequential or economic losses, as Barkley allegedly sustained here. *See also, Federal Commerce*, 528 F.2d at 908 (recognizing that *The Sucarseco* is inapposite to the *Robins Dry Dock* doctrine); *Mathiesen v. M/V OBELIX*, 817 F.2d 345, 347 (5th Cir.), *cert. denied*, 484 U.S. 898, 108 S. Ct. 234, 98 L. Ed. 2d 192 (1987).

Here, the wheat seed sustained no physical damage and was never "in jeopardy," and neither Barkley nor National Seed made any "sacrifice" or "extraordinary contribution" to "avert a common peril." *The Sucarseco* simply does not apply.

C. BARKLEY'S CLAIM IS BARRED BY EVEN THE MOST STRINGENT READING OF *ROBINS DRY DOCK*.

Barkley contracted with Cormorant for transport of its wheat seed from Los Angeles to Saudi Arabia (RT, Feb. 9, 100:19-101:3). Cormorant issued bills of lading to Barkley for carriage of the wheat seed (RT, Feb. 9, 145:12-16). Barkley's contention, couched in terms of general maritime law negligence against Vessel Interests, is that as a

result of Vessel Interests' alleged negligence in their maintenance and operation of the M/V SINGAPORE VICTORY, the vessel did not meet Barkley's expectations under its contracts (the bills of lading) with Cormorant.[10] But for the Barkley-Cormorant contract, Barkley would have no right to expect the M/V SINGAPORE VICTORY to be capable of making any particular speed.

This Court in *Robins Dry Dock* squarely rejected such claims. The charter party between Vessel Interests and Cormorant "imposed no immediate obligation upon" Vessel Interests to third persons. *Robins Dry Dock,* 275 U.S. at 308. Whether Vessel Interests performed the charter party "promptly or with negligent delay" was the business of Cormorant alone. *Id.* Barkley's alleged losses arose solely by virtue of its contract with Cormorant. *Id.* Under those circumstances, *Robins Dry Dock* precludes Barkley from recovering in tort from Vessel Interests. *Getty Rfg. & Mktg. Co. v. M/T FADI B,* 766 F.2d 829, 833-34 (3d Cir. 1985) (terminal operator sustained economic losses solely as a result of contracts with other vessels that could not dock due to defendants' negligence).

A case almost directly on point is *Louis Dreyfus Corp. v. 27,946 Long Tons of Corn,* 830 F.2d 1321 (5th Cir. 1987). In that case, a vessel owner (KMTC) contracted with a

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[10] Barkley is contending that Cormorant's breach of the bills of lading caused Barkley to breach its contract with National Seed, putting National Seed in potential breach of its contracts with Saudi farmers, leading to the alleged damages incurred by National Seed and Barkley. It is thus evident that the contracts ultimately interfered with (between National Seed and the Saudi farmers) were two contracts removed from Vessel Interests' alleged negligence.

shipper (Dreyfus) for transport of Dreyfus' grain. During loading, the vessel's engine room flooded due to a defective valve, resulting in economic damages to Dreyfus. Dreyfus filed suit against KMTC, the ship builder, and the valve system manufacturer. The Fifth Circuit affirmed the district court's award of damages to Dreyfus against KMTC, with whom Dreyfus shared privity of contract.

More significant for purposes of the Petition, however, the court also affirmed the district court's finding that Dreyfus' claims against the ship builder and valve manufacturer were barred by *Robins Dry Dock. Dreyfus*, 830 F.2d at 1328. In this case, Cormorant occupies the position of the contracting party (KMTC) in *Dreyfus*. Vessel Interests, on the other hand, occupy the position of the non-contracting defendants, as to whom *Robins Dry Dock* barred recovery.

Another case almost directly on point is *Cargill, Inc. v. Doxford & Sunderland, Ltd.*, 782 F.2d 496, *rehearing denied*, 785 F.2d 1296 (5th Cir. 1986). In that case, a vessel encountered engine difficulties while carrying a shipper's grain. After the shipper ultimately removed the grain from the ship, it sued the shipyard allegedly responsible for the engine failure, seeking to recover its economic losses. In rejecting the shipper's claim, the court explained its reasoning:

> There can be no recovery in tort unless the defendant has breached a legal duty owed to the plaintiff. . . . If [the shipyard] caused or contributed to the malfunction of the SERENA's engine, it did not thereby breach any legal duty owed to [the shipper]. . . . [The shipper's] injury and [the

> shipyard's] allegedly wrongful acts were related only in that these acts prevented the SERENA or her owner from performing a contract with [the shipper]; that the breach of this contract may have arisen directly from [the shipyard's] negligent repair of the SERENA's engine could not give [the shipper] any right to recovery in tort against [the shipyard].

782 F.2d at 498-99.

Accordingly, since Barkley's alleged economic loss was caused by Cormorant's failure to perform its contractual obligations, Barkley's remedy, if any, is against Cormorant in contract, and not against Vessel Interests in tort. *Robins Dry Dock; Cargill; see also, Holt Hauling & Warehousing Systems, Inc. v. M/V MING JOY,* 614 F. Supp. 890 (E.D. Pa. 1985). Barkley's negligence claim here is another example of an overreaching plaintiff contributing to what has been referred to as the "tortification of contract law." *Oki America, Inc. v. Microtech Intl., Inc.,* 872 F.2d 312, 315 (9th Cir. 1989) (Kozinski, C.J., concurring).

D. BARKLEY'S MISCONDUCT IN PREMATURELY NEGOTIATING THE MISDATED BILLS OF LADING ESTOPS IT FROM RECOVERING AGAINST VESSEL INTERESTS AND OBVIATES THIS COURT'S NEED TO EXAMINE *ROBINS DRY DOCK.*

The district court ruled that irrespective of the *Robins Dry Dock* doctrine, Barkley was estopped from recovering on its negligence claim because its negotiation of the

misdated bills of lading was a substantial factor contributing to the alleged loss. (Appendix D to Petition, pp. 32-33, ¶ 34.)

Barkley concealed material information from its assignee, National Seed, by failing to inform National Seed about the vessel's mechanical problems and resulting delays. Once Barkley submitted the misdated bills of lading and collected full payment from National Seed under the letters of credit, National Seed reasonably believed that the cargo had been loaded on schedule and would arrive in Saudi Arabia when expected.[11] The misdated bills of lading and other false information disseminated by Barkley created a climate of uncertainty and concern at National Seed. Those feelings led National Seed to prematurely and unnecessarily purchase wheat to use as "cover" seed, causing most of the alleged economic losses.

It would be manifestly unjust to allow Barkley to benefit from its fraud against National Seed, by taking an assignment of National Seed's damages resulting from that fraud and then recovering them in a negligence action against Vessel Interests. For that reason, the district court correctly ruled that Barkley was estopped from asserting a negligence claim. Accordingly, this Court need not even consider the *Robins Dry Dock* doctrine in affirming the orders of the district court and the Ninth Circuit and denying the Petition.

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[11] Bills of lading and letters of credit are time-honored negotiable instruments, the integrity of which are the core of international business transactions.

CONCLUSION

Barkley's petition should be denied in its entirety. The circuit courts of appeals uniformly agree that the *Robins Dry Dock* doctrine is the law of the land. Moreover, Barkley's negligence claim is precluded even in the absence of *Robins Dry Dock*, by virtue of Barkley's premature negotiation of misdated bills of lading.

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